



Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

The plaintiff, acting pro se (meaning as his own attorney) and counsel for the defendants have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by plaintiff or defense counsel and that stated by the Court in these instructions, you are to be governed by the Court's instructions.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice or public opinion. All parties expect that you will carefully and impartially consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences

All Persons Equal Before the Law

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. In addition, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, whether an individual or a corporation, stand equal before the law and are to be dealt with as equals in a court of justice.

Evidence in the Case

Statements and arguments of the parties are not evidence in the case. When, however, both sides stipulate or agree as to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Questions Not Evidence

If the plaintiff or defense counsel has asked a witness a question which contains an assertion of fact, you may not consider the assertion of fact in the question as evidence of that fact. These assertions of fact are not evidence.

Evidence -- Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence -- the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but it simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

### Inferences Defined

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

### Opinion Evidence -- Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses, including expert witnesses, and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which the witness has testified, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; any bias or prejudice; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear

it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of one witness, or of a small number of witnesses, as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

INSTRUCTIONS OF LAW

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

### Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

Similarly, as to certain affirmative defenses, the burden is on the defendant in a civil action to prove every essential element of his or her affirmative defense by a preponderance of the evidence. If the proof should fail to establish any essential element of a defendant's affirmative defense by a preponderance of the evidence in the case, the jury should find for the plaintiff as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is

more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

### Breach of Contract

The plaintiff alleges the defendants' refusal to cover his loss constitutes a breach of their insurance contract. To prevail on this claim, the plaintiff must prove by a preponderance of the evidence the following:

1. the existence of a contract between the parties;
2. the terms of the parties' contract;
3. whether the contract was in fact breached; and
4. whether that breach of contract was a proximate cause of the plaintiff's injuries.

Several of these elements are undisputed. As to element 1, it is undisputed that the insurance policy which Mass Bay issued to the plaintiff is a contract.

Likewise, as to element 2, the relevant terms of the policy are undisputed. Here, the policy Mass Bay issued to Mr. Austin provides insurance coverage for accidental fires. However, it does not provide coverage for "an insured who commits or directs an act with the intent to cause a loss." Furthermore, the policy prohibits Mr. Austin "from intentionally conceal[ing] or misrepresent[ing] any material fact or circumstance," "engag[ing] in fraudulent conduct," or "ma[king] false statements" relating to the insurance policy or any claim made thereunder.

Thus, it is left for you to determine whether the plaintiff has proven by a preponderance of the evidence that the fire loss resulted from a cause covered by the insurance policy

at issue. It also is for you to determine whether the conduct of either the plaintiff or the defendants failed to comply with the terms of that contract.

If you determine that the plaintiff did not comply with the terms of the parties' contract, then you have necessarily found that the plaintiff has breached the contract and your verdict must be for the defendants.

However, if you find that the defendants' conduct did not comply with the terms of the parties' contract, then you have found in favor of the plaintiff, and you must proceed to determine the amount of damages, if any, to which the plaintiff may be entitled.

### Misrepresentations Under the Contract

As a first affirmative defense, the defendants claim Mr. Austin breached the contract by intentionally concealing or misrepresenting material facts and circumstances, making false statements, or engaging in fraudulent conduct relating to his insurance claim. The defendants have the burden of proving this affirmative defense by a preponderance of the evidence.

As I have already explained, the policy at issue prohibits Mr. Austin "from intentionally conceal[ing] or misrepresent[ing] any material fact or circumstance," "engag[ing] in fraudulent conduct," or "ma[king] false statements" relating to the insurance policy or any claim made thereunder. An intentional concealment or misrepresentation of a material fact by an insured to an insurer is considered a refusal to cooperate within the terms of the insurance contract, thereby vitiating coverage. To prevail on this defense, the insurer must prove that one or more of the plaintiff's alleged misrepresentations were material in that: (1) there was an intentional misrepresentation of an existing fact; (2) which affected the essence of the transaction; (3) that was false when made and known to be false by the maker; and (4) which concerned a matter not otherwise open to the insurer's knowledge.

If you conclude that the plaintiff intentionally concealed or misrepresented any material fact or circumstance, engaged in fraudulent conduct or made false statements relating to his insurance claim, then the defendants properly denied

coverage and the plaintiff is not entitled to collect proceeds under the policy.

### Proof of Arson

As a second affirmative defense, the defendants claim the plaintiff is not entitled to coverage under the insurance policy because the fire at the plaintiff's house was the result of arson. To prevail on this claim, the defendants must prove by a preponderance of the evidence each and every one of the following elements:

1. the fire at the plaintiff's home was an incendiary fire;
2. the fire was set by or on behalf of the plaintiff;
3. the plaintiff had a motive and opportunity to set the fire; and,
4. suspicious acts relating to the fire.

Circumstantial evidence may be used to establish arson. As arson is a covert and clandestine act, there is seldom direct evidence of the actual perpetration. Thus, a well-connected train of circumstances may be as satisfactory as an array of direct evidence to prove arson by a preponderance of the evidence.

You have been asked to consider motive, opportunity and suspicious circumstances when determining whether the defendants have met their burden of proof on this issue. Note, however, that none of these standing alone necessarily prove the plaintiff set the fire or caused the fire to be set. Instead, you must evaluate all the circumstances when making your determination.

If you should conclude that the plaintiff intentionally started the November 12, 1993 fire, or caused it to be started, and did so with the intention of damaging or destroying his property, then under the parties' contract, the defendants properly denied coverage and the plaintiff is not entitled to collect any proceeds under that policy.

Corporate Party's Agents and Employees

The defendants are corporations. When a corporation is involved, of course, it may act only through natural persons as its agents or employees. In general, any agent or employee of a corporation may bind the corporation by his or her acts and declarations made while acting within the scope of his or her authority delegated to him or her by the corporation, or within the scope of his or her duties as an employee of the corporation.

Moreover, as a general rule, the knowledge of an agent acting within the scope of his or her authority is chargeable to the principal, regardless of whether that knowledge is actually communicated.

The existence and scope of an agent's authority is a question of fact for the jury to determine.

Effect of Instruction as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

### Damages

If you should find for the plaintiff and against the defendant as to any of his claims, then you must consider the issue of damages.

The amount of damages the plaintiff shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate the plaintiff fully and adequately for all injuries and losses caused by defendant's wrongful conduct. In other words, the purpose of awarding damages is to place the injured person in the position he or she occupied immediately before the injury occurred, as nearly as can be done with an award of money damages.

The plaintiff must prove, by a preponderance of the evidence, the amount of damages to which he is entitled. You may include only the damages the plaintiff has proven with reasonable certainty. You may not award speculative damages or damages based on sympathy.

Election of Foreperson

I will select \_\_\_\_\_ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the form of the special verdict.

[Form of special verdict read.]

You will note that each of these interrogatories or questions call for a "Yes" or "No" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

Verdict Forms - Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

### Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the Marshal. He will then bring the message to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

H. RICHARD AUSTIN :  
: :  
v. : CIVIL NO. 1:95CV170  
: :  
HANOVER INSURANCE COMPANY: :  
& MASSACHUSETTS BAY : :  
INSURANCE COMPANY : :  
\_\_\_\_\_ :

SPECIAL INTERROGATORIES AND VERDICT FORM

A. Do you find that the defendants have proven by a preponderance of the evidence that the plaintiff intentionally concealed or misrepresented material facts and circumstances, made false statements, or engaged in fraudulent conduct relating to his insurance claim?

\_\_\_\_\_ yes \_\_\_\_\_ no

B. Do you find that the defendants have proven by a preponderance of the evidence that the plaintiff intentionally set an incendiary fire at his home in Warren, Vermont?

\_\_\_\_\_ yes \_\_\_\_\_ no

If you have answered "yes" either to question A or question B, then your deliberations are complete, and you should sign and date this form.

If you have answered "no" to both question A and question B, then you have found a breach of contract, and you must assess damages in question C.

C. What is the total amount of damages sustained by the plaintiff as a result of the conduct of the defendant?

\$ \_\_\_\_\_

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

H. RICHARD AUSTIN

v.

HANOVER INSURANCE COMPANY:  
& MASSACHUSETTS BAY  
INSURANCE COMPANY

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CIVIL NO. 1:95CV170

Verdict Form

We have reached a verdict.

\_\_\_\_\_  
Foreperson

\_\_\_\_\_  
Date